No. 15,940

United States Court of Appeals

For the Ninth Circuit

OTIS, MCALLISTER & CO., a corporation, *Appellant,* vs. SKIBS, A/S MARIE BAKKE, *Appellee.*	

APPELLEE'S BRIEF.

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vs.

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APPELLEE'S BRIEF.

JURISDICTION.

Appellee does not controvert the statement of jurisdiction presented by the appellant.

STATEMENT OF THE CASE.

Appellee does not controvert that portion of appellant's Statement of the Case presented on page 2. On page 3 certain of appellant's statements should be modified to state the case correctly. In the court below, appellee claimed that the recoverable damages should be measured (not that "liability should be limited", as stated by appellant) by Clause 18 of its bill of lading.[1] Appellee contended

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[1]The District Court concluded that "Libelant's damages are to be measured" by Clause 18 (Conclusion of Law IV, Tr. 45.)

that Clause 18 was an agreed valuation clause[2] and was valid and binding on the parties. Appellant contended that Clause 18 was invalid by reason of Section 3(8) of the Carriage of Goods by Sea Act (COGSA), (46 U.S. Code Sec. 1303(8)) which voids clauses which relieve a carrier from liability arising from negligence in the duties or obligations imposed by Section 3 or lessen such liability. Both Judge Hamlin, in the Order overruling appellant's exception to the Answer (Tr. 30), and Judge Goodman, in the Order for Decree (Tr. 39-40), concluded that Clause 18 is "a valid 'true valuation clause'." An agreed valuation clause does not relieve a carrier from liability or lessen such liability and is not invalidated by COGSA. A Final Decree (Tr. 46) was entered awarding appellant damages measured by the agreed valuation clause. Clause 18 provided in its relevant parts that:

> "it is agreed that in view of the difficulty of determining in advance what the market value of the goods will be upon arrival at destination, the 'agreed value' thereof . . . shall be an amount equal to the shipper's invoice value, if any, . . . plus . . . freight, insurance and duties, . . . irrespective of whether any other value is greater or less, and in case of loss of, or damage to, or in connection with such goods, the Carrier's liability, if any, shall be determined on the basis of such 'agreed value', . . ."
>
> (Finding of Fact VII, Tr. 43)

[2]It is inaccurate to refer to an agreed valuation clause, as appellant does in the statement and throughout the brief, as an "invoice value clause". The clause fixes a value which includes not only "invoice value" but also "freight, insurance and duties", thus assuring the cargo owner of full recovery of the actual landed cost of the goods at destination, i.e., his entire investment in purchasing, transporting, insuring and entering the goods through Customs. The cargo owner is thus "insured" against any out-of-pocket loss even if the market price should decline.

Appellant states the issue of this appeal (Br. 4) as: "whether a common carrier subject to the Carriage of Goods by Sea Act may utilize an invoice clause to reduce its liability to an amount less than the actual damages suffered . . ." The issue correctly stated is: Does the Carriage of Goods by Sea Act prevent the parties to an ocean bill of lading from agreeing to a formula to determine the value of goods in calculating any damages for which the carrier may become liable?

ARGUMENT.

Appellee's argument is summarized as follows:

Clause 18 of the bill of lading governing the shipment is an agreed valuation clause. Such a clause was valid in bills of lading under the general rules of maritime law and under the Harter Act, 46 U.S. Code, Secs. 190, et seq. Nothing in COGSA effects a change in the law by which the freedom of the parties to provide for an agreed value to be used in determining damages is abridged. The meaning of the words of COGSA as interpreted by the Supreme Court does not invalidate agreed valuation clauses. Neither the history of COGSA nor the record of its passage by Congress in 1936 shows any intention to change the prior law with respect to agreed valuation clauses.

The issue before this Court is clouded unless the distinction between "agreed valuation clauses" and "clauses of limitation" as defined by the United States Supreme Court is understood. Appellant admits there is a distinction (Br. 11) but dismisses the distinction as insignificant. In fact, the distinction is critical to the issues before this

Court and must be fully understood before the application of COGSA to agreed valuation clauses can be determined. Hereafter we shall first consider what agreed valuation clauses are, the rules concerning them before COGSA, and finally the proper effect of COGSA on those rules.

I.

THE DISTINCTION BETWEEN "AGREED VALUATION CLAUSES" AND CLAUSES AFFECTING OR LIMITING LIABILITY.

Fundamental to resolution of the issue before the Court is the distinction between agreed *valuation* clauses and other clauses such as those which *affect* liability or *limit* the amount of recoverable damages. For clarity and convenience in considering these matters, three different clauses should be defined and distinguished:

(a) "Negligence" or "liability" clauses, which we shall call *liability clauses,* relieve a carrier from legal responsibility for negligence in performing its obligations or duties, as the obligation to load, stow and carry the goods. Under the Harter Act certain exemptions from liability were granted by Section 3 and all others which would have the effect of relieving the carrier from liability or lessening, weakening or avoiding the carrier's obligations to the cargo were prohibited by Sections 1 and 2. Similar statutory exemptions are granted by Section 4(2) of COGSA (46 U.S. Code Sec. 1304(2)) and similar prohibitions against other contractual exemptions are provided in Section 3(8) of COGSA. Liability clauses are not in issue in this case.

(b) By agreed or "true valuation" clauses, which we shall call *agreed valuation clauses,* the parties agree in advance that the goods shall have a certain value, or agree upon a formula for determining that value, which is to be used in calculating the amount of damages, *after* legal responsibility has been determined to exist. The amount of damages so determined may be greater or less than, or the same as, the amount would be in the absence of such agreement. Depending upon the facts of each case, the clause may therefore benefit either party to the agreement. Neither the Harter Act nor COGSA specifically treats such clauses. The Supreme Court held them valid under the Harter Act[3]. Whether this rule has been changed by COGSA is the issue in this case.

(c) "Limitation" or "limitation of liability" clauses, which we shall call *limitation clauses,* fix an arbitrary maximum amount which the carrier shall pay, after legal responsibility has been determined, irrespective of the actual damages. The limitation clause, usually providing that the carrier shall not be liable "in an amount exceeding" a specified amount of money per package, unrelated by formula or otherwise to actual value, can only operate *against* the cargo owner, never *for* him. The Harter Act left such clauses to contract between the parties. Now the limitation is expressed both in Section 4(5) of COGSA (46 U.S. Code, Sec. 1304(5)) and in contractual provisions which repeat the same monetary limit set by the statute. Limitation clauses are not in issue in this case.

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[3]Appellant admits this rule, so extended citation of authority is unnecessary. The leading case is *Smith v. The FERNCLIFF,* 306 U.S. 444, 59 S. Ct. 615, 83 L. Ed. 862, 1939 AMC 403 (1938).

Each of the clauses will apply in a given case as illustrated in the following example: Silk, in boxes, is totally damaged during ocean carriage. Assume the CIF value is $490 per box and the market value at destination is either (a) $450 or (b) $530. If the carrier is not excused by a *liability clause* relieving it of legal responsibility for the damage, liability is determined. After liability has been determined, the *agreed valuation clause* is applied to fix a value on the goods for the purpose of calculating damages, which under Clause 18 would be $490 (assuming no Customs duties applied). If the contract contained no agreed valuation clause and if damages were calculated by reference to market value[4], the value of the goods would be (a) $450 or (b) $530. Then the statutory limit of $500 per package, and the contractual *limitation clause* expressing the statutory limit are applied to fix the amount which the carrier must actually pay. If the contract contained an agreed valuation clause, cargo would recover $490. If there were no agreed valuation clause, cargo would recover either (a) $450 or (b) $500.

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[4]While we concede that the usual legal measure of damages, in the absence of a contractual provision otherwise, refers to market value at destination, the law is flexible in applying other measurement factors where reason and convenience so indicate. For example, in *Instituto Cubano de Establizacion del Azucar v. Star Line*, 1958 AMC 166 (Arb.), damages were measured by reference to purchase price of the goods at port of embarkation to fix value, plus freight and customs duties.

> "The Courts, indeed, have frequently held that damages are not necessarily based on market prices, and, as a matter of practice, settlements are usually based on the invoice." *Poor on Charter Parties and Ocean Bills of Lading*, 4th Edition (1954), page 184.

The foregoing example illustrates these points:

(1) A liability clause operates to determine whether there is any legal responsibility of the carrier at all. It does not fix or affect the damages recoverable if the carrier is held liable.

(2) An agreed valuation clause merely furnishes a means of determining the value of the goods in calculating damages. It does not determine liability. It can, as compared with market value or any other standard of value, *either increase or decrease* the value of the goods used in calculating the damages recoverable by the cargo owner.

(3) A limitation clause *may decrease* the damages otherwise recoverable, but it *never increases* them.

II.

THE SUPREME COURT APPROACH TO RESOLVING THE ISSUE OF THIS CASE.

The correct approach for resolving the issue of this case is established by the Supreme Court in *U.S. v. Atlantic Mutual Insurance Co.,* 343 U.S. 236, 72 S. Ct. 666, 96 L. Ed. 907 (1951) (*ESSO BELGIUM-NATHANIEL BACON*). While the *ESSO BELGIUM* is concerned with a "Both-to-Blame" clause and with different sections of the Harter Act and COGSA,[5] the approach of the Court

[5]A "Both-to-Blame" clause in a carrier's bill of lading would be classified as a liability clause, as hereinabove defined, and was found invalid as a stipulation against a carrier's liability for negligence. The result of the case does not affect other bill of lading clauses, such as agreed valuation clauses. The phrasing and application of the Both-to-Blame clause itself have no particular relevance to the present proceedings.

to the question of validity of a particular clause under COGSA is important and controlling here. The Court stated, 343 U.S. at page 240:

> "Our question . . . is whether the langauge of the Harter Act, substantially reenacted in the Carriage of Goods by Sea Act, has carved out a special statutory exception to the general rule . . ."
>
> (Page 241) "When Congress passed the Carriage of Goods by Sea Act in 1936, it indicated no purpose to bring about a change in the long-existing relationships and obligations between carriers and shippers which would be relevant to the validity of the 'Both-to-Blame' clause. At that time all interested groups such as cargo owners, shipowners, and the representatives of interested insurance companies were before the congressional committees. Although petitioner and respondents both appear to find comfort in the language and the hearings of the 1936 Act, nothing in either persuades us that Congress intended to alter the Harter Act in any respect material to this controversy."

In the *ESSO BELGIUM,* the Court found that a Both-to-Blame clause would be invalid under the general rules of maritime law and under the Harter Act. It concluded that nothing in the language or Congressional hearings of COGSA indicated that COGSA altered those general rules or the rule under "the Harter Act in any respect material" to that clause.

Applying the criteria of the Supreme Court to the present case we must determine: (1) What were the general rules and the rule under the Harter Act with respect to agreed valuation clauses? (2) Did Congress, in enacting COGSA carve "out a special statutory exception to the general rule'' or ''alter the Harter Act in any respect material to'' agreed valuation clauses? (3) When Congress passed COGSA in 1936 did it indicate any ''purpose to bring about a change in the long-existing relationships and obligations between carriers and shippers which would be relevant to the validity of'' an agreed valuation clause?

A.

The General Rule, Before COGSA, Declared Agreed Valuation Clauses Valid.

Agreed valuation clauses were valid under the general rules and under the Harter Act.[6] Appellant admits this to be the case. In this respect this case is just the reverse of the *ESSO BELGIUM* in which the clause there under consideration was invalid under the general rules and under the Harter Act.

B.

The Language of COGSA Indicates no Change in the General Rule Prior to COGSA.

Did Congress by enacting COGSA carve ''out a special statutory exception to the general rule'' or ''alter the Harter Act in any respect material to'' agreed valuation clauses? Appellant argues that the language of Section 3(8) of COGSA materially differs from Sections 1 and 2 of the Harter Act. Let us first examine the language of the sections.

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[6] *Smith v. The FERNCLIFF*, supra, 306 U.S. at 448:
"For a long time, in the absence of a controlling statute, fraud or imposition, such provisions in bills of lading have been recognized as valid by this and other Federal Courts."

The Harter Act, Sections 1 and 2 (46 U.S. Code, Secs. 190 and 191) provide it shall not be lawful for the manager, agent, master or owner of any vessel:

> "(Sec. 190) to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge . . . [or] (Sec. 191) whereby the obligations of the owner or owners of said vessel to exercise due diligence to properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided."[7]

Any and all words or clauses of such import inserted in bills of lading or shipping receipts were declared by Section 190 to be null and void and of no effect.

Section 3(8) of COGSA, read with the balance of Section 3, merely restates Sections 1 and 2 of the Harter Act in one paragraph instead of two.

Does Section 3(8) of COGSA contain language materially different from Sections 1 and 2 of the Harter Act? The same duties are imposed elsewhere in Section 3. Section 3(8) then provides:

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[7]"These two sections, in their general purport, so far as respects the care and delivery of cargo, are not substantially different . . ." *Calderon v. Atlas Steamship Co.* (1897) 170 U.S. 272, 277, 18 S. Ct. 588, 42 L. Ed. 1033, 1035.

> "Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect."

Section 3(8) is substantially identical in content to Sections 1 and 2 of the Harter Act. Certainly no express reference is made to agreed valuation clauses nor is any change explicit with regard to such clauses.[8] Nor is it surprising to find the same words and the same concepts of the Harter Act rephrased in COGSA when it is acknowledged that COGSA was intended "to carry over into the international sphere the uniformity achieved for American voyages in the Harter Act.", and embodies "substantially the provisions of the earlier Harter Act of 1893" (*Scarburgh v. Compania Sud-Americana de Vapores,* (CA NY 1949) 174 F. 2d 423.) It seems quite obvious that the words themselves of Section 3(8) do not reveal any "special statutory exception to the general rule" nor "alter the Harter Act in any respect material to" agreed valuation clauses.

The decisions under the Harter Act have given meaning to the words reenacted in Section 3(8) of COGSA and are applicable to the same words of COGSA. *The BILL* (DC Md. 1942) 47 F. Supp. 969, affirmed 145 F.

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[8]Contrast the concluding words of COGSA Section 3(8) "A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability", an express reference which is not contained in the Harter Act.

2d 470. *Spencer Kellogg & Sons v. Great Lakes Transit Corp.* (ED Mich. 1940) 32 F. Supp. 520, 530.

> "In view of the well-settled nature of the general rule at the time the statute was adopted, it must result that legislative approval was by clear implication given to the general rule as then existing in all cases where it was not changed."
>
> *The KENSINGTON,* 183 U.S. 263, 268-269, 22 S. Ct. 102, 46 L. Ed. 190, 193, as quoted with favor in the *ESSO BELGIUM,* 343 U.S. at pages 239-240.

Under the Harter Act an agreed valuation clause was valid. Such a clause "*prescribes a measure of recovery* rather than limits the amount which may be recovered when loss or damage occurs." (Emphasis added.) *Smith v. The FERNCLIFF,* supra.

It is useless to cull refinements of meaning from a fussy examination of the words "obligation" and "liability". These are not words of art. Section 3 of COGSA sets forth a carrier's obligations to exercise due diligence, to load, stow, carry, care for and discharge the goods carried. Patently a breach of these obligations creates liability. When COGSA seeks to prevent these obligations from being in any way reduced or avoided, it provides in Section 3(8) that liability for breach of an obligation may not be lessened. Substantially the same obligations in Section 3 of COGSA are set forth in Sections 1 and 2 of the Harter Act. These sections address themselves to the same fundamental matter of a carrier's liability for its obligations. An "obligation" includes liability to respond for breach. Lessening the liability for breach lessens the obligation, a result prohibited by the Harter Act. Similarly when recovery is reduced from, say, $100 to $80, can it only be said that liability, or the obligation, was "relieved" by $20 but was not "lessened" by the same amount? Such words were not given narrow technical meanings. If, for example, "liability" were used in the Act as a word of art, then it should certainly be distinguished from the "measure of liability" or the amount which is recovered after "liability" is established. In fact, Section 4(5) of the Act does refer specifically to "the amount of damage", "the maximum amount" and words of like purport when referring to monetary recovery for liability. We are certain that appellant, even for consistency's sake, is unwilling to limit the word "liability", as used in Section 3(8) of COGSA, to this narrow meaning[9]. To do so would end this case summarily. In any event, perhaps the foregoing will illustrate that this kind of approach to the problem merely turns an important inquiry into a legalistic game of "Scrabble". It is historically clear that the drafters of COGSA and Congress were not concerned with such shades of meaning. Any inquiry, to be profitable, must avoid word haggling and go into the history of COGSA to ascertain how the Act came before Congress and how Congress intended it should apply.

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[9]Appellant seems to have had some concern about this possibility, for it makes an effort to show that "lessening of liability prohibited by Section 3(8) also refers to the measure of damages" (Br. 14). In other words, appellant says "liability" in Section 3(8) should not be given a narrow meaning but should be given a broader meaning to include "measure of damages." But, in trying to show a difference between the Harter Act and COGSA, appellant would give narrow meanings to the same words in the Harter Act.

C.

The History of COGSA Indicates no Intention to Change the Relationships Between Carriers and Shippers in Any Way Relevant to the Validity of Agreed Valuation Clauses.

The *ESSO BELGIUM* requires an answer to this question: Was there "a purpose to bring about a change in the long existing relationships and obligations between carriers and shippers"? Appellant turns to this inquiry only briefly when it notes that the Supreme Court in the *ANSALDO SAN GIORGIO*[10] used the words "may lessen the carrier's normal liability" (when discussing the effect of a true valuation clause on a rising market) and assumes that Congress enacted this meaning into COGSA (Br. 12). Otherwise appellant dismisses the whole inquiry as "of only historical interest." Unfortunately any approach that italicizes six words in a Supreme Court decision and concludes that Congress relied upon these and the possibility of future litigation to make explicit a basic change in the law does not get us far in our inquiry. In this instance appellant's conclusion that Congress was "using those words [of the Supreme Court in 1935] in the same sense" in COGSA becomes meaningless when it is recalled that the words in Section 3(8) were written in 1922 and formalized in an international Convention in 1924, commonly referred to as the Hague Rules. This section of the Hague Rules was enacted verbatim by Congress in 1936. Except for this single, and patently erroneous, reference to the question of congressional intent, appellant ignores the whole inquiry. What does careful inquiry into the development of the Hague

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[10] *Ansaldo San Giorgio I v. Rheinstrom Bros. Co.,* 294 U.S. 494, 55 S. Ct. 483, 79 L. ed. 1016 (1935).

Rules and the record of their enactment into law by Congress in 1936 show?

The history of the Hague Rules up to their enactment by Congress in 1936 is set forth in the hearings before the Senate and House. *Hearing before the Senate Committee on Commerce on S 1152,* 74th Congress, 1st Session, pages 17 et seq., 29 et seq., 45 et seq., 77 et seq. Briefly, the Harter Act, passed by Congress in 1893, represented a highly successful compromise in the United States of conflicting carrier and shipper aims. Pressure thereafter developed among the leading commercial nations to achieve in the international sphere of trade the uniformity of American voyages under the Harter Act. *Scarburgh v. Compania Sud-Americana de Vapores,* supra.

> "Starting with American law as a basis, as regulated by the Harter Act, . . . a code was drafted under the auspices of the International Law Association, and a conference was then called at The Hague, at which shippers, bankers, cargo underwriters, and steamship owners were fully represented. At that Conference . . . this draft code was debated, section by section, and an agreement was arrived at for a fair division of the risks of transportation between the cargo interest on the one hand, and the carriers, on the other." (Report of the Senate Committee on Foreign Relations, printed in the *Senate Hearing,* supra, page 17 et seq.)

A Diplomatic Conference at Brussels in 1924 resulted in adoption of the code as a Convention which was then signed by all twenty-four nations present, including the United States, Great Britain and the other great maritime powers. The succeeding years witnessed study, debate and gradual acceptance of the Hague Rules by all interested commercial groups on the American scene. In 1930, a general conference called by the United States Chamber of Commerce was attended by an impressive group of shippers, underwriters, bankers, merchants and other cargo interests resulting in agreement to recommend approval of the Hague Rules to Congress. This conference was important because of the broad scope of cargo interests represented and the careful consideration reportedly given to the Convention and all suggestions submitted relevant to it.

The Convention was approved by the Senate for ratification on April 1, 1935. Enactment of the Convention into statutory form was the subject of hearings before committees of both houses of Congress. Support of the Convention before the Committees was unanimous.[11]

Reports and recommendations from the Departments of State and Commerce and the Attorney General were received. An underlying inquiry throughout the hearings was "how, if at all, does COGSA change existing American law under the Harter Act?" Time and time again witnesses and reports addressed themselves to this question and enumerated the changes COGSA would bring about. All agreed that the principal changes were:

1. COGSA raises the per package limitation of liability to which the carrier is entitled to $500. The carrier is prohibited from limiting its liability, as

[11]"At that time all interested groups, such as cargo owners, shipowners and the representatives of interested insurance companies were before the Congressional Committee." *ESSO BELGIUM,* 343 U.S. at page 241.

it previously could, to some lower figure. *COGSA Section 4(5).*

2. The time for commencing suit against a carrier for damage to goods is fixed at one year. *COGSA Section 3(6).* Previously, shorter time limits had been permitted.

3. Unless the cause of damage to cargo falls within one of the specific exemptions enumerated in COGSA Section 4(2) (a) through (p), the burden of proof is placed upon the carrier to prove that he was not negligent if goods received sound are delivered damaged. Previously, the burden of proof of negligence was usually on the cargo owner.

4. The harsh results of the Supreme Court's decision in *The ISIS,* 290 U.S. 333, were alleviated in connection with the carrier's burden of showing due diligence for seaworthiness even if not causally related to the cargo damage.

Some witnesses and reports before the Committees were more detailed. For example, the Department of Commerce Memorandum of S-1152 discusses the Act section by section with respect to any changes made in existing law. With respect to Sections 3(7) and (8), it stated:

> "No change of existing law except that by the latter 'benefit of insurance' provisions in bills of lading are nullified. Such provisions now are valid but in practice are made negatory . . . For practical purposes, this change in the law is unimportant—it merely accomplishes by law what in practice heretofore has been done by contract." *Hearings before the Committee on Merchant Marine and Fisheries,*

House of Representatives, 74th Congress, Second Session, page 11.

A lengthy statement presented by the American Bankers Association to both House and Senate Committees (House, page 42, Senate, page 45) analyzes the bill carefully, comparing it to the Harter Act, and noting changes to be brought about. No change is noted with respect to Section 3(8) or as to agreed valuation clauses. A memorandum submitted by the American Steamship Owners Association spells out ten advantages to be gained by shippers from the bill. (House, page 59.) In this analysis the only reference to change under Section 3(8) is to invalidation of benefit of insurance clauses.

Throughout the hearings before the Senate and House no suggestion is made that Section 3(8) makes any change in existing law in any respect material to agreed valuation clauses.

At no time in the hearings is an agreed valuation clause mentioned, examined or explained.[12]

At no time did any shipper interest or report express concern with such clauses or condemn them as objectionable, although many clauses were debated, including the

[12]In several instances in the hearings and reports, when referring to Section 4(5) and the $500 per package limitation, statements appear, as "restrict recovery to an agreed valuation as low as $100 per package" (Campbell—House p. 60) and "The Harter Act makes no direct reference to valuation clauses . . . [COGSA] imposes a liability of $500 per package" (Barber—Senate p. 32). In each instance it is clear from the context that "valuation" is in no sense given a meaning of art. The reference is always in connection with limitation of liability clauses and with section 4(5) of the Act and not concerned with agreed valuation clauses as we have used that term and as it is used by the Supreme Court in *The FERNCLIFF* and in *ANSALDO SAN GIORGIO*.

"Both-to-Blame" clause and the prorating clause later condemned in *The CAMPFIRE,* infra.

There are definite references in the hearings to specific bill of lading clauses wherever any relevant change in existing law will be brought about. For example, the benefit of insurance clause mentioned in Section 3(8), is discussed because the law would be changed, even though the practical effect of the change was of no significance. In the case of "Both-to-Blame" clauses, which were only then coming into use, discussion for a time got quite lively when cargo interests sought to have COGSA amended to remove any uncertainty in the Act as to the validity of such clauses. As the Court states in the *ESSO BELGIUM,* 343 U.S. p. 241, both parties to the controversy over "Both-to-Blame" clauses found comfort in the hearings of the Act. There were also references in the hearings to recent Supreme Court cases, particularly *The ISIS,* supra, in any instance where the Act would effect a change in the existing law as interpreted by the Supreme Court. Nowhere, however, is reference made to the *ANSALDO SAN GIORGIO,* supra, or to the six words of that decision which appellant assumes were used by Congress "in the same sense in" COGSA.

Congress was not ignorant on the subject of agreed valuation clauses. Nor were shippers and carriers by rail and water and their underwriters unaware of them. They had long used such clauses and involved them in various court tests culminating with the *ANSALDO SAN GIORGIO* in 1935 and *The FERNCLIFF* which involved a pre-COGSA shipment of goods. In 1915 Congress had enacted the Cummins Amendment (49 U.S.

Code, Sec. 20(11)) to the Interstate Commerce Act specifically prohibiting rail carriers from including in rail bills of lading "any limitation of liability or limitation of the amount of recovery or representation or *agreement as to value . . .*"[13] (Emphasis added). Congress therefore had precise statutory language at hand which it had previously used and could have used in COGSA if it intended to change the rule under the Harter Act. Why did Congress not use explicit language, as it had before, if the change in the law appellant asserts was intended? In other connections, Congress changed words, phrases and added provisos to make "explicit a right which otherwise might be regarded as merely implied in the language" of the Act. (Senate Report No. 742, 74th Congress, 1st Session, page 2.)

In conclusion, a thorough exploration into the legislative history of COGSA demonstrates no purpose on the part of Congress (in the words of the *ESSO BELGIUM*) "to bring about a change in the long-existing relationships and obligations between carriers and shippers which would be relevant to the validity" of agreed valuation clauses. In the absence of such Congressional purpose, we must conclude that COGSA, like the Harter Act before it, left the parties to bill of lading contracts free to agree on the value to be used in computing damages, and Con-

[13]This language was declared by Justice Holmes in 1920 to invalidate agreed valuation clauses in rail carriers' bills of lading. *Chicago RR Co. v. McCaull-Dinsmore Co.,* 253 U.S. 97, 40 S. Ct. 504, 64 L. Ed. 801 (1919), cited with approval by the Supreme Court in *The FERNCLIFF,* 306 U.S. p. 448. In holding the clause invalid, Justice Holmes recognized the convenience of such a stipulation in a bill of lading and the arguments in its favor. By its express terms, the Cummins Amendment left the rules applicable to water carriers unchanged.

gress neither found nor expressed any public policy against this long-existing practice.

III.

CERTAIN POINTS OF APPELLANT'S BRIEF REQUIRING CLARIFICATION.

Certain specific points raised in appellant's brief require clarification.

A

The Dictum of the District Judge in The FERNCLIFF.

Appellant quotes (Br. 15) a dictum from *The FERNCLIFF* decision of 1938 as follows: "The particular question is not likely to again arise as the subject is now regulated by the Carriage of Goods by Sea Act . . ." Actually the quoted words, like many in that opinion, are those of District Judge Chestnut and are a part of the lengthy portion of his opinion quoted by the high court. In certifying the questions to the Supreme Court, Judge Chestnut also stated:

> "Notwithstanding the passage of the Carriage of Goods by Sea Act of April 16, 1936 . . . the question as to the correct method of computing damages under a valuation clause is deemed an important one . . ."

Whatever Judge Chestnut may have meant by these two apparently conflicting dicta, it is clear that after fuller opportunity to consider the matter, he concluded that the difference between an agreed valuation clause and a limitation clause was important under COGSA. His analysis of the issues in *The STEEL INVENTOR*, 35 F. Supp. 986 (D. Md. 1940) and *The BILL*, 55 Supp. 780 (D. Md. 1944) is enlightening. In *The STEEL IN-*

VENTOR he had before him a clause which *limited* the amount of the carrier's liability to *invoice cost* and he stated (page 998):

> "It is said by a recent commentator that, despite the provisions of the recent United States Act, [COGSA] it is still permissible for the shipper and carrier to agree that loss claims shall be adjusted on the basis of the invoice value of the merchandise instead of on the market price at port of destination, that is, they may agree upon a true valuation clause as contrasted with a limited liability clause. Knauth on Ocean Bills of Lading, p. 161. But it is said by counsel that there is no judicial decision on this point. Assuming the correctness of the position as stated, I am still unable to reach the conclusion that the provision in the bill of lading relied on is controlling in this case. As I read and construe it, it constituted a 'limitation of liability clause' and is not a 'true valuation' clause. The distinction between, and the respective legal effects of, the two types of clauses are clearly explained in two recent Supreme Court cases."

Judge Chestnut held that the clause in question was a limitation clause invalid under Section 4(5) of the Act. This conclusion was obviously correct, since the clause was worded as a *limitation,* not as an agreement on value. In discussing COGSA, he observes that the effect of the Act

> "leaves the shipper free to recover his actual damages when less than the maximum stated in the Act . . . at least where the bill of lading does not contain a true valuation clause as distinct from a mere limitation of liability clause."

In *The BILL,* Judge Chestnut considered an agreed valuation clause in a bill of lading covering a shipment of oil in bulk. The clause provided for damages to be measured on the basis of market price at the port of destination. The application of the clause would have resulted in damages of $546.70 per customary freight unit, "thus exceeding the limitation in the Act of $500 per 'customary freight unit'." The carrier is permitted by Section 4(5) of COGSA to agree to a *limitation* higher than $500 per package. Therefore, if the bill of lading clause were the kind of limitation provision expressly permitted by Section 4(5) of the Act, the court would have had to apply it. The court, however, held the bill of lading clause "is a valuation clause rather than a limitation clause, and does not override the requirements of the limitation clause in the Act." (55 F. Supp. at 783). The court concluded (page 784) that neither the particular wording nor the bill of lading clause "in the whole context, furnishes any reasonable basis for the view that it was intended to override the limitation clause *or to express 'another maximum amount'* than that contained in the limitation clause." (Our emphasis.)

B

The Case and Text Authorities.

Appellant cites the following cases and authorities to support its position:

- *The HARRY CULBREATH,* 1952 A.M.C. 1170 (SD NY) (Br. 15 et seq.);
- *The CAPE CORSO,* 1954 Lloyd's Law List Reports, Vol. II, page 40 (Br. 16 et seq.);
- Gilmore and Black: *The Law of Admiralty* (1957) (Br. 22-23).

In the *HARRY CULBREATH* the carrier's liability for damage was determined in trial before the District

Court and the cause was then referred to a commissioner "to ascertain and report the amount due said libelant." The commissioner applied market value in ascertaining the amount due and rejected the valuation clause of the bill of lading. The district judge simply confirmed the commissioner's report. The case was not appealed. It does not appear whether or to what extent the issues were briefed or argued before the District Judge. The commissioner's report demonstrates a complete failure to appreciate the effect of agreed valuation clauses and relies upon cases dealing with limitation clauses. We submit that the commissioner's opinion was not well reasoned and is simply incorrect.

The *CAPE CORSO* is a decision of the Court of British Columbia Admiralty District, Exchequer Court, and the decision was not appealed. We submit that an appellate court will not be bound by a Canadian court's reading of American law, particularly when the Canadian judge, in reaching his conclusion, (a) relied upon the above-mentioned dictum of the District Judge of *The FERNCLIFF*, apparently believing the Supreme Court had passed on the matter, and without, evidently, considering the later conclusions of the author of the dictum; (b) relied upon the *McCall-Dinsmore* case, supra, without fully appreciating the Supreme Court's ruling that the language of the Cummins Amendment was explicit on the question of valuation clauses in rail bills of lading and that, consequently, reasonableness of the clause could not override clear statutory language; (c) ascribed a reason for the Supreme Court's holding in *The FERNCLIFF* which was neither stated nor intimated by that high court; and (d) reached his conclusion without reference to the process prescribed by the Supreme Court in the *ESSO BELGIUM.*

In any event, we submit that the conclusions of Judge Hamlin and Judge Goodman are entitled to greater weight than those of a commissioner in New York and a Canadian judge reading United States law.

With respect to text authorities, we refer the court, in contrast to the Gilmore and Black single volume on the entire law of admiralty, to the following:[14]

Knauth on Ocean Bills of Lading, 4th Ed. pp. 277-279[15];

Poor on Charter Parties and Ocean Bills of Lading, 4th Ed. pp. 183-184, 221-223;

A. J. Hodgson—The Carriage of Goods by Sea Act 1924 (1932) p. 34.

We do not feel that any useful purpose will be served by extended discussion of *The CAMPFIRE,* 156 F 2d

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[14]These authorities do not indulge in such questionable editorializing and black descriptions as "gradual erosion by carefully contrived clauses . . . drawn up by carriers in concert." We think the editors, Gilmore and Black, should have read the Supreme Court's decisions on the problem. The two decisions which to those editors "seem clearly correct" are actually not concerned with agreed valuation clauses at all, but only with limitation of liability clauses.

[15]The author, Arnold W. Knauth, then secretary of the Maritime Law Association and probably the leading authority on ocean bills of lading in the United States, appeared before both the Senate and House Committees in the hearings on the bill. He concluded, at page 278 of the cited edition, that "There seems to be nothing in the Carriage of Goods Act to prevent the continuance of this practice" of agreed valuation clauses, and at page 279, "The silence of Congress in the COGSA legislation of 1936 (into which several amendments were introduced, and to which several extra sections were annexed) would seem to imply refusal to condemn the clause in the COGSA trades."

603 (CA 2, 1946) or *The EXIRIA,* 1958 AMC 439 (SD NY 1958) both of which were concerned with the $500 per package limitation of Section 4(5) of COGSA. Each decision declares invalid a clause providing for a limitation of liability in a form otherwise than provided by Section 4(5). We do not disagree with the proposition that limitation clauses are invalid under Section 4(5) of COGSA if they violate the statutory requirement that "such maximum shall not be less than the figure above named." Such a proposition is not, however, material to the question of agreed valuation clauses.

There were also particular requirements for validity of limitation clauses under the Harter Act. They were invalid unless "tied to the rate"—i.e. unless the shipper was offered a choice of freight rates depending on what maximum limitation he was willing to accept. If the validity of an agreed valuation clause depended on meeting the requirements for validity of a limitation clause, then under the Harter Act an agreed valuation clause would have to be "tied to the rate" to be valid. This precise question was certified to the Supreme Court in *The FERNCLIFF*. The question was:

> "1. Is an invoice cost valuation clause, such as that here involved, inserted in a marine bill of lading without offering a choice of rates to a shipper, valid and binding on the parties?"

After pointing out the fundamental difference between and effect of an agreed valuation clause and a limitation clause, the high court answered:

> "To the first certified question, we reply, Yes where there has been no fraud or imposition;"

There is no distinction between the principle of that case and this one. The rules governing validity of a limitation clause under COGSA (Section 4(5)) have no more bearing on the validity of an agreed valuation clause under COGSA than the rules governing validity of a limitation clause under the Harter Act had on the validity of an agreed valuation clause under the Harter Act. The two clauses are entirely different; the rules governing one do not affect the other. Cases involving limitation clauses, governed by COGSA Section 4(5), have nothing to do with an agreed valuation clause or with this case.

C

The Fearful Spectre of the Carrier Rides Again.

While appellant endeavors (Br. 21-23), as in the court below, to suggest carrier domination in bill of lading matters, we shall not fill this brief with debate on issues of such questionable relevance to these proceedings. A reading of the appearances in the hearings before Congress will dispel such notions. The shipper and cargo interests, represented by such rather formidable organizations as the United States Chamber of Commerce, the National Association of Manufacturers, the Institute of American Meat Packers, the American Bankers Association, the Automobile Manufacturers Association and others, have been neither silent nor ineffective before legislatures or courts, at international conventions or in the day-by-day commercial transactions which determine the scope, content and effect of bills of lading. The contrary view is somewhat archaic and we regret its entry in these proceedings.

IV.

THE ISSUE OF "CUSTOM" IN THIS CASE.

The existence of a custom of long standing in the coffee trade to settle and pay claims on the basis of F.O.B. invoice value plus freight and insurance is established by Libelant's Answer to Request for Admission (Tr. pp. 24-28) and by Findings of Fact X and XI (Tr. 44-45).

Appellee acknowledges that, if COGSA had expressly or by necessary implication declared agreed valuation clauses invalid, or if Congress had indicated any intent or purpose to effect such a change in existing law and in the long established maritime rules and relationships, then no custom, however long established, could override a statutory prohibition. But COGSA neither expressly nor impliedly invalidates agreements on value and Congress obviously had no such purpose in mind.

The established custom does, we submit:

(a) show general acceptance and sanction of such agreements which fix the value to be used in calculating damages;

(b) illustrate how such agreements facilitate the determination of damages, whether in settlement negotiations or before a court or commissioner, without protracted dispute or extended evidence as to some less certain measure of value, such as market;

(c) indicate that appellant and its fellow members of the Pacific Coast Coffee Association, while urging and securing amendment of other sections of the Green Coffee Agreement, have not considered the provisions fixing value worthy of similar effort—

possibly because these provisions often work to cargo's benefit;

(d) illustrate the "collective bargaining" type of commercial relationships between strong economic groups which contrasts vividly with the picture appellant seeks to paint of poor, little "unorganized" cargo interests opposing big, predatory "organized" ocean carriers, and

(e) demonstrate that shippers, in practice, consider it sound to forego a speculative profit dependent upon the rise and fall of market in return for an absolute assurance of full return of all invested cost in the goods, landed at destination.

V.

THE FIRST AUTHORITATIVE DECISION ON AGREED VALUATION CLAUSES WILL BE BY THIS COURT.

In conclusion, we concur with appellant's observation (Br. 4): "there being no prior appellate decision on the precise point involved, the decision of this Honorable Court will be of great importance to everyone connected with the shipment and carriage of merchandise to and from United States ports in foreign commerce." The commercial and shipping interests here and wherever the Hague Rules apply throughout the world await the first authoritative decision on the question of agreed valuation clauses. In the *ESSO BELGIUM,* the Supreme Court would not permit the ocean carrier to put *into* the bill of lading contract, a clause which would have been *invalid* under the Harter Act, stating as its reason that no purpose of Congress was shown to bring about a change in the prior law or in the long existing relationships between carriers and shippers. This court should not permit cargo interests to force *out* of the bill of lading contract a clause which was *valid* under the Harter Act, when no purpose of Congress is shown to bring about the same changes in prior law and relationships.

It is obvious that, in passing COGSA, Congress had no intention or even the slightest thought (in the words of the *ESSO BELGIUM*) of carving "out a special statutory exception to the general rule", and "indicated no purpose to bring about a change in the long-existing relationships and obligations between carriers and shippers which would be relevant to the validity" of agreed valuation clauses, and "nothing in either [the language and hearings of COGSA] persuades us that Congress intended to alter the Harter Act in any respect material to this controversy."

In this state of affairs, the following language of the Supreme Court in *Halcyon Lines v. Haenn Ship Ceiling Corp.,* 342 U.S. 282, 286, 72 S.Ct. 277, 96 L. Ed. 318, seems particularly appropriate:

> "Many groups of persons with varying interests are vitally concerned with the proper functioning and administration of all these Acts as an integral whole. We think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests of these groups. The legislative process is peculiarly adapted to determine which of the many possible solutions to this problem would be most beneficial in the long run. A legislative inquiry might show that neither carriers, shippers, employees,

or casualty insurance companies desire such a change to be made."

That the decree of the District Court should be affirmed is

Respectfully submitted,
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Dated, San Francisco, California,
July 9, 1958.